SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-733

LONG ISLAND LIGHTING COMPANY,
—against— *Petitioner,*
STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC., MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY AND TEXACO OVERSEAS PETROLEUM COMPANY,
Respondents.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
—against— *Petitioner,*
STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC., MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY AND TEXACO OVERSEAS PETROLEUM COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT

Petitioners LONG ISLAND LIGHTING COMPANY ("LILCO") and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. ("CON EDISON") respectfully pray that a Writ of Certiorari be issued to review the judgment

and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on August 22, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto as Exhibit A. The opinion of the District Court is reported at 390 F. Supp 1172, and appears in the appendix as Exhibit B.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on August 22, 1975. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

I. Whether the District Court and Court of Appeals on motions pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure improperly granted summary judgment on the merits of petitioners' antitrust claims by dismissing them for lack of standing to sue under Section 4 of the Clayton Act?

II. Whether the conflict among the circuits on rules for determining who has standing to sue for antitrust violations should be resolved?

III. Whether the Second Circuit's "target area" standing test contradicts the settled construction of the antitrust laws established by this Court?

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act and Sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 1, 2, 15 and 26, which are set forth in the Appendix as Exhibit E, and Federal Rules of Civil Procedure 12 and 56, set forth in the Appendix as Exhibit F.

STATEMENT OF THE CASE

A. Preliminary

These are antitrust actions for treble damages and injunctive relief brought by two East Coast public utilities, LILCO and CON EDISON, against three major integrated oil companies and two of their subsidiaries: Standard Oil Company of California ("SOCAL") and its wholly-owned subsidiary, Chevron Oil Trading Company; Texaco Inc. ("TEXACO") and its wholly-owned subsidiary, Texaco Overseas Petroleum Company; and Mobil Oil Corporation ("MOBIL"). The complaints appear in the Appendix as Exhibits C and D.

The first claim for relief of each complaint seeks damages incurred and injunctive relief as a result of a joint and illegal attempt to stop the flow of Libyan low sulphur oil to the United States, constituting an unlawful boycott. After the boycott, the utilities obtain reduced quantities of replacement oil at a greatly increased price and on terms distinctly less favorable than prior to the boycott, and the first claims seek these and other damages, in the case of LILCO, $186,000,000 and for CON EDISON, $156,000,000. These claims were dismissed below and that dismissal and its affirmance precipitate this petition.

The LILCO complaint also sets forth a second claim for relief, which seeks damages resulting from the oil companies' conspiracy to monopolize and monopolization of the market for the production and sale of low sulphur crude oil and its products in the East Coast of the United States. The District Court dismissed this claim as well, but the Court of Appeals reversed this part of the District Court's decision and reinstated LILCO's second claim.

B. The First Claims For Relief

The boycott which is the subject of the first claims for relief was an outgrowth of unlawful activity commenced by the major oil companies in January, 1971 with the formation of the London Policy Group ("LPG"), a non-public organization of the international oil cartel. Its members were the so-called "majors," including respondents, and a number of "independent" oil companies. It was formed ostensibly to enable its members jointly to plan policy with respect to and to negotiate with members of the Organization of Petroleum Exporting Countries ("OPEC"). In operation, however, the LPG's activities ranged far beyond these limited purposes.*

Documents uncovered in the most preliminary discovery show that from its inception the LPG functioned as a vehicle for the major oil companies to control the price and supply of petroleum and petroleum-related products in the free world, including Libyan low sulphur oil. Using these documents, LILCO and CON EDISON sought to demonstrate to the courts below that the boycott described in the complaints was part of a much larger conspiracy affecting the price and supplies of oil to the free world, a conspiracy which is the subject of the second claim for relief of the LILCO complaint. These documents confirm that the boycott was proposed by SOCAL and expressly agreed to by MOBIL, TEXACO and the other major LPG members. The boycott was then planned and implemented by the LPG, and orchestrated through its extensive communications network.

*In a series of Business Review Letters, the Department of Justice gave limited sanction to joint *negotiation* with host country governments by LPG members. It later cautioned the oil companies in a letter, dated October 5, 1973, which expressly condemned the precise activities which are the subject of the first claims for relief in these actions:

> "Last, let me stress that our non-disapproval is in no way intended to sanction or authorize any *joint oil company action which tends to reduce the supply of petroleum to the United States, such as . . . joint agreements among oil companies to halt production or cease lifting oil in any country, to boycott oil from any country, or to chase so-called 'hot oil'.*" (emphasis added).

The effect it would have on the utilities was well understood. The utilities were required by environmental regulations to burn low sulphur oil and there was no effective substitute for it. Immediately prior to the boycott, the supply of low sulphur oil became critically low. Libya had become the only available source of low sulphur oil to the utilities. Indeed, as the oil companies were expressly warned, if the utilities were denied supply of this particular grade of oil, blackouts and brownouts to the millions of customers in their service areas would be imminent.

The particular low sulphur oil used by LILCO and CON EDISON had come from a field in Libya operated jointly, pursuant to a concession, by SOCAL and TEXACO. Prior to the boycott, SOCAL distributed substantially all of its share of oil produced from the concession through the New England Petroleum Company ("NEPCO"), a refiner-wholesaler. SOCAL delivered the oil in its tankers to a refinery in the Bahamas, owned jointly by SOCAL and NEPCO, where it was refined and delivered by NEPCO to LILCO and CON EDISON.

LILCO and CON EDISON received the oil under long term supply agreements with NEPCO. In the year prior to the filing of these complaints, LILCO and CON EDISON purchased approximately twenty million barrels of this low sulphur oil.

LILCO and CON EDISON had been induced to enter into the long term supply agreements with NEPCO on the express representation of SOCAL that it would stand behind and support NEPCO and guarantee supplies of this oil for the duration of the agreements. The effect of these agreements, whose existence was common knowledge in the petroleum industry, was to make SOCAL's and TEXACO's Libyan concession a major source of supply for the East Coast of the United States. At the time of the boycott, when low sulphur oil was in extremely short supply, it had become, as a practical matter, the only available source.

Under established Libyan law, the crude oil under Libyan soil was owned by Libya, and the oil companies' concessions constituted contractual rights permitting them to produce and market the oil. The event which ostensibly precipitated the illegal group boycott was the announcement by the Libyan government on September 1, 1973 demanding a 51% participation in the contractual holdings in Libya of foreign oil companies, including the holdings of SOCAL and TEXACO that supplied LILCO and CON EDISON, and the holdings of MOBIL. By the terms of this decree, 49% of the concession rights would not be disturbed. The oil from the remaining 51% would be offered for sale to the oil companies by the Libyan government. However, the LPG had recently concluded agreements with the Persian Gulf countries granting those governments only a 25% interest in their crude oil concessions; SOCAL, TEXACO, MOBIL and the other "majors" feared that a grant of 51% to Libya, where their interests and holdings were relatively minor, might jeopardize the Persian Gulf agreements, where they had far more vast and more valuable concessions.

Accordingly, after the Libyan action, at an LPG meeting on September 6, 1973, SOCAL's chairman suggested, and MOBIL, TEXACO and the other LPG majors agreed:

> "Not to operate at 49% of normal rate—nor to handle any oil exports on behalf of the Libya Govt."*

Thereafter, pursuant to the conspiracy, SOCAL, MOBIL, TEXACO and the other LPG majors jointly refused to produce or export any Libyan oil. SOCAL with-

*Quotations attributed to executives of the oil companies are from documents obtained by the utilities in preliminary discovery which were presented to the District Court as exhibits to the affidavit of Asa D. Sokolow, sworn to December 20, 1974.

drew its tankers, which had been used to transport oil to the NEPCO refinery in the Bahamas and, despite its earlier commitment to guarantee supplies of this oil to the utilities, refused to supply any replacement oil from its worldwide resources.

The LPG members were fully conscious of the nature of their act as a naked restraint of trade, aimed at that market which was most important to its effectiveness. At a prior LPG meeting, at which "negotiating strategy" was discussed, the oil companies determined that if they could not reach a favorable agreement with Libya they would not only refuse to lift Libyan oil but would "close the eastern seaboard of the U. S. to Nat'd [nationalized] oil" and would police the boycott by chasing any so-called "hot oil" with a series of lawsuits to prevent the nationalized oil or any Libyan oil from reaching the Eastern Seaboard.

Hence there can be no doubt that the oil companies knew the effect the boycott would have on LILCO and CON EDISON. Indeed, as the largest consumers of Libyan low sulphur oil, the utilities were the intended and direct victims, whose injury was essential to the success of the boycott. The oil companies were expressly warned that Libyan low sulphur oil was "used primarily to supply low sulphur fuel to CON EDISON OF NEW YORK . . . LONG ISLAND LIGHTING COMPANY . . . and other East Coast utilities." They were further expressly warned that a consequence of the boycott would be "severe power blackouts" and "potentially irrevocable damages" to LILCO and CON EDISON. Nevertheless, the oil companies implemented and enforced the boycott.

Faced with this boycott, NEPCO opened negotiations with the Government of Libya for the direct purchase of reduced quantities of low sulphur oil, partially to replace that oil which SOCAL had, in concert with TEXACO and MOBIL, ceased producing or exporting from its Libyan

concession. However, this oil was offered to NEPCO, and by NEPCO to the utilities, at nearly double the pre-boycott price. LILCO and CON EDISON tried but were unable to obtain low sulphur crude oil from other sources. No LPG member submitted an offer. Therefore, under the compulsion of environmental restrictions precluding their use of high sulphur fuel oil, and to avoid interruptions of service, LILCO and CON EDISON had no choice but to agree to purchase from NEPCO the oil it had obtained from the Government of Libya, which was the only low sulphur oil available.

In furtherance of the boycott, and as planned, SOCAL, TEXACO and MOBIL made every effort to prevent this replacement oil from reaching the utilities. On September 13, 1973, within minutes of each other, NEPCO's executives received threatening telephone calls from executives of SOCAL and TEXACO. These calls were followed by almost identical threatening letters from SOCAL and TEXACO.

When verbal threats failed, SOCAL, TEXACO and MOBIL (although MOBIL did not produce this type of low sulphur oil in Libya) instituted a series of more than 25 lawsuits against NEPCO, chasing its ships around the world in an effort to stop the flow of Libyan low sulphur oil to the utilities. These lawsuits were brought despite the fact, as shown by their own documents, that the oil companies knew that they could not establish any ownership rights to the oil in a court of law. The oil companies, by this course of action, sought to preclude others from purchasing this oil from the Government of Libya or transporting it to the United States.

LILCO and CON EDISON did receive a reduced quantity of oil from NEPCO, avoided the threatened blackouts and brownouts, and paid the greatly increased prices. They brought these actions to recover that cost as well as other damages sustained.

C. The Decisions Below

The oil companies moved to dismiss the complaints in the District Court, purportedly pursuant to Rule 12(b)(6), on the ground that the utilities did not have standing to maintain these actions. The motions were heard after petitioners had been permitted only the most limited of documentary discovery, no interrogatories, and no oral depositions of respondents. One respondent, MOBIL, has not even answered the complaint. In response to the motions, LILCO and CON EDISON submitted a series of documents which proved the averments of the complaints and established by direct documentary evidence that under any test applicable to standing, these utilities were proper plaintiffs because they were the intended victims of the boycott.

However, ignoring the facts alleged in the complaints and refusing to consider the utilities' proffered documents, the District Court dismissed the complaints. 390 F. Supp. 1172 (S. D. N. Y. 1975) (A-17).* It held that the utilities were not in the "target area", and hence did not have standing, because the anti-competitive conduct of the oil companies was "directed at Libya or the Persian Gulf states or all of them" but not LILCO or CON EDISON. 390 F. Supp. at 1176 (A-27).

There was no such allegation in the complaints.

Disregarding all supplementary factual material presented by petitioners, the Court went on to find as fact that LILCO and CON EDISON were not injured by any antitrust violation by the oil companies. The District Court stated that if anyone had a right to sue, it was NEPCO, the only private party wronged by the action of SOCAL. *Id.* (A-26).

The Court of Appeals affirmed, but on somewhat different grounds. It concluded that LILCO and CON

*References to "A- " are to the Appendix annexed hereto.

EDISON were not in the "target area", since the boycott was aimed primarily at Libya and secondarily at Saudi Arabia. Slip op. at 5728* (A-10).

Again, there was no such allegation in the complaints.

The utilities were found, despite their injuries resulting directly and immediately from the oil companies' acts, to be too "remote" from the antitrust violations and to have no standing to sue. Slip op. at 5729 (A-11). Although it was clear on the face of the complaints, as well as in the supporting documents presented on the motion, that LILCO and CON EDISON suffered damages because they were large consumers of SOCAL's Libyan low sulphur oil, for which there was no substitute available to them at that time, the Court nevertheless held that LILCO and CON EDISON "were not the objects of the alleged antitrust violations" and that "[t]heir injuries were the result of their relationship to NEPCO, an intermediate non-target." *Id.* at 5728 (A-10). Purporting to apply the same "target area" test as the District Court, the Court of Appeals thus determined that even NEPCO, which the District Court had assumed to be a "target" of the antitrust violations, did not have standing to sue.

The Court of Appeals did, however, sustain the Second Claim for Relief of the LILCO Complaint, which the District Court had also dismissed for lack of standing. As to the Second Claim, the Court of Appeals ruled:

> "The second count, in marked contrast to the first, moves the target area of the alleged conspiracy from Saudi Arabia and Libya to the East Coast of the United States. It charges a conspiracy to reduce supply and inflate prices charged to electric utilities. *Clearly LILCO is within the target area of such a conspiracy.*" Slip op. at 5733 (A-15) (emphasis added).

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*References to the opinion of the Court of Appeals, not yet reported, are to its slip opinion, annexed in the Appendix hereto.

However, identical allegations were contained in the first claims for relief in both complaints (*see, eg.*, ¶¶ 22, 23, A-39).* Indeed, the documents applicable to both claims speak expressly of closing the Eastern Seaboard of the United States to low sulphur oil. If the utilities have standing to bring the Second Claim, then, on the basis of the Complaints, they must have standing to prosecute the First.

THE REASONS FOR GRANTING THE WRIT

I—THE DISTRICT COURT AND COURT OF APPEALS ON MOTIONS PURSUANT TO RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE IMPROPERLY GRANTED SUMMARY JUDGMENT ON THE MERITS OF PETITIONERS' ANTITRUST CLAIMS BY DISMISSING THEM FOR LACK OF STANDING TO SUE UNDER SECTION 4 OF THE CLAYTON ACT.

The courts below dismissed these claims on the merits before any significant discovery and even before one defendant had even answered. The excuse offered was "standing"—the result achieved was "summary judgment" —summary judgment without consideration of petitioners' affidavit and based on facts not pleaded in the complaints.

In dismissing the first claims for relief below, both Courts focused on what they deemed to be the motive and intent of the oil companies, but it is firmly established that summary judgment "should be used sparingly in complex antitrust litigation where motive and intent play leading roles. . . ." *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464, 473 (1962). Indeed, as this Court held in *Conley* v. *Gibson,* 355 U. S. 41, 45-6 (1957), "in appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that

*For the convenience of the Court, references to "¶ " are to the LILCO complaint annexed in the Appendix hereto as Exhibit C. Almost identical allegations are contained in the CON EDISON complaint, annexed in the Appendix hereto as Exhibit D.

the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

It should be apparent that this admonition will apply with even greater force to motions to dismiss addressed to the pleadings under Rule 12(b)(6) of the Federal Rules of Civil Procedure, but this has not been so, particularly in the standing area. District courts and courts of appeals in many circuits are showing no reluctance under the guise of Rule 12(b)(6) to dismiss complaints summarily—a lack of reluctance that most assuredly would be inappropriate on a motion for summary judgment under Rule 56.*

This increasing use of Rule 12(b)(6) summarily to dismiss antitrust complaints, and particularly the ruling in these cases, clearly "threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 136 (1968). For this reason alone, this Court should grant certiorari and should halt this alarming trend.

**See, e.g., Reibert* v. *Atlantic Richfield Co.*, 471 F. 2d 727 (10th Cir.), *cert. denied*, 411 U. S. 938 (1973); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F. 2d 1292 (2d Cir. 1971), *cert. denied*, 406 U. S. 930 (1972); *Jeffrey* v. *Southwestern Bell Telephone Co.*, 372 F. Supp. 979 (N. D. Tex. 1974), *aff'd*, 1975-2 Trade Cas. ¶ 60,482 (5th Cir. 1975); *W. T. Grant Co.* v. *Christensen*, 1975-1 Trade Cas. ¶ 60,324 (S. D. N. Y. 1975); *Carroll* v. *Protection Maritime Ins. Co.*, 377 F. Supp. 1294 (D. Mass. 1974) *aff'd in part*, 512 F. 2d 4 (1st Cir. 1975); *Nassau Cty. Ass'n of Ins. Agents* v. *Aetna Life & Cas. Co.*, 361 F. Supp. 967 (S. D. N. Y. 1973), *aff'd*, 497 F. 2d 1151 (2d Cir.), *cert. denied*, 419 U. S. 968 (1974). *Pollack* v. *Balfour Co.*, 1973-2 Trade Cas. ¶ 74,339 (N. D. Ill. 1972); *Contreras* v. *Grower Shipper Vegetable Ass'n*, 1971 Trade Cas. ¶ 73,592 (N. D. Cal. 1971), *aff'd*, 484 F. 2d 1346 (9th Cir. 1973), *cert. denied*, 415 U. S. 932 (1974); *Barr Rubber Products Co.* v. *McNeil Corp., et al.*, 1971 Trade Cas. ¶ 73,678 (N. D. Ohio 1970); *Cosentino* v. *Carver Greenfield Corp.*, 1970 Trade Cas. ¶ 73,390 (D. Neb. 1969), *aff'd in part*, 433 F. 2d 1274 (8th Cir. 1970); *SCM Corp.* v. *Radio Corp. of America*, 276 F. Supp. 373 (S. D. N. Y. 1967), *aff'd*, 407 F. 2d 166 (2nd Cir.), *cert. denied*, 395 U. S. 943 (1969).

Cf., Rule 56 and *In re Western Liquid Asphalt Cases*, 487 F. 2d 191 (9th Cir. 1973), *cert. denied*, 415 U. S. 919 (1974).

The utilities consistently have taken the position that it is evident on the face of the complaints that they have standing. However, these are complex cases raising difficult issues of motive, intent and causation. Therefore, to overcome the motions to dismiss, which were supported by an extensive statement of "background facts" including an affidavit with exhibits offered by MOBIL in support of its 12(b)(6) motion, the utilities submitted certain documents obtained from respondents in preliminary discovery. The District Court, in exercise of its "discretion,"* refused to treat respondents' motions as motions for summary judgment—which they clearly were—excluded the proffered documents, purported to limit its inquiry to the face of the complaints themselves, and then effectively rewrote the complaints.

As we shall demonstrate, however, the District Court based its opinion on a number of factual determinations inconsistent with the allegations of the complaints, and on apparent factual misconstructions of the nature of the utilities' claims. Its decision, in effect, on a purported Rule 12(b)(6) motion, granted summary judgment to respondents.

The Second Circuit also refused to consider the proffered documents. It made its own factual findings, formulated its own construction of the complaints and held that the utilities were not and could not as a fact have been "objects" of the conspiracy. Slip op. at 5728 (A-10). It rested its conclusion on two findings of fact: (a) that the

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*Rule 12(b) provides in relevant part:

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

conspiracy was "aimed" at others and (b) that injury to the utilities was the result of their relationship to NEPCO, whom it termed "an intermediate non-target," and therefore not a possible plaintiff. *Id.* (A-10-11). Neither of these findings of fact is justified by the wording or allegations of the complaints, or by the documents from the files of respondents submitted on the motion.

A. The Decisions Below Disposed of the Merits of the Claims.

In deciding issues of motive or object and physical causation, at a preliminary stage before full discovery (and before one respondent has even answered), the courts below fell into precisely the logical trap perceived by the Sixth Circuit in *Malamud* v. *Sinclair Oil Corp.*, 1975-2 Trade Cas. ¶ 60,442 (6th Cir. 1975). The Court in *Malamud* observed that the application of target area and direct injury standing tests were eliciting a confusion in the courts "between the determination of a litigant's standing and a decision on the merits of his position." 1975-2 Trade Cas. at 66,949. The result was the imposition of an undue pleading burden on plaintiffs and the improper dismissal of antitrust litigation at its incipiency. *Id.*

> "As we see it, . . . by using either approach *a court is enabled to make a determination on the merits of a claim under the guise of assessing the standing of the claimant.* Under either theory [of standing] *the entire question of directness is one that must be resolved upon some factual showing, but standing is a preliminary determination ordinarily to be evaluated upon the allegations of the complaint.* As a result, a party may make sufficient allegations to demonstrate the necessary standing to sue but fail to prove his case on the merits." *Id.* (emphasis added).

Similarly, the courts below have decided the *merits* of petitioners' claim under the guise of assessing the standing

of the claimants,* and, as pinpointed by *Malamud,* did so on the basis of a summary factual conclusion that the utilities were "remote" parties.

B. The District Court's Findings

The District Court professed to find it "difficult" to discover from the complaints, which it termed "general and conclusory,"** the nature of the antitrust violations alleged. It reluctantly assumed for purposes of the motion that "some kind" of antitrust violations were alleged. 390 F. Supp. at 1175 (A-26). However, although excluding the documents submitted, it proceeded to find as fact that:

(a) the anticompetitive conduct alleged was the rejection by defendants of Libya's 51% participation demand;

(b) no anticompetitive conduct of defendants was directed against plaintiffs;

(c) the business decision by SOCAL after the Libyan nationalization to refuse to deliver oil to NEPCO was a wrong to NEPCO, perhaps, but not to plaintiffs;

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*This is particularly well illustrated by the differing findings with respect to the significance of NEPCO. The District Court viewed NEPCO as a possible plaintiff (A-26). To the Court of Appeals, NEPCO was an "intermediate non-target" (A-10). However, as the Court of Appeals itself recognized in its decision on LILCO's second count, the facts concerning the relationship of NEPCO to LILCO and of LILCO to the respondents could not be resolved on this motion. NEPCO's unique position as a conduit for the respondents, on the one hand, and as their competitor, and perhaps even their co-conspirator, on the other, were matters better left for discovery and proof at trial. Slip op. at 5733 (A-15).

***But see, Nagler* v. *Admiral Corp.*, 248 F. 2d 319, 322-3 (2d Cir. 1957):

> "So many defense lawyers have strongly advocated more particularized pleading in this area of litigation; and recently the judges in the court below have treated it as accepted law that some special pleading—the extent is left unclear—is required in antitrust cases. But it is quite clear that the federal rules contain no special exceptions for antitrust cases."

(d) the "target" of the conspiracy—if there were one —was Libya or the Persian Gulf States or all of them; and

(e) the only cause of injury to the utilities was that Libya raised its price, which did not benefit defendants. *Id.* at 1175-6 (A-26-7).

C. The Court of Appeals' Findings

The Court of Appeals viewed the complaints somewhat differently but with the same effect. Its opinion characterized the thrust of the complaints, "construed in the light most favorable to plaintiffs", as follows:

> ". . . the defendants, *motivated* by their interest in strengthening their position in dealing with Saudi Arabia, *organized a group boycott against* Libyan oil in an effort to dissuade the Libyan government from nationalizing 51% of their oil concessions; that pursuing the boycott of Libyan oil they stopped delivering it to NEPCO; that NEPCO obtained it directly from NOC* at higher prices, and that LILCO and CON EDISON were forced to pay these higher prices." Slip op. at 5726-7 (A-8-9) (emphasis added).

It then concluded, once again after excluding the utilities' documents, that, *under the only construction possible*, Libya, or perhaps Saudi Arabia, was the "target" and that the injuries sustained by LILCO and CON EDISON "were the result of their relationship to NEPCO, an intermediate non-target." *Id.* at 5728 (A-10). Therefore, the utilities were as "remote" from the defendants' boycott as the stockholders, employees, landlords, franchisors and licensors excluded by previous Second Circuit decisions. *Id.* at 5728-9 (A-10-11).

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*"NOC" refers to the National Oil Company, owned by the Government of Libya, which engages in the marketing of crude oil on its behalf.

D. The Utilities' Averments

The complaints do not allege that Libya or Saudi Arabia was the target of the conspiracy. On the contrary, the complaints allege that pursuant to an ongoing conspiracy in effect since January, 1971, a boycott was imposed by the oil companies on low sulphur oil destined for LILCO and CON EDISON (¶¶ 22-3, 28, 37, A-39, 41, 44). They refused to lift or export Libyan low sulphur oil, and attempted through threats and through chasing "hot oil," to coerce those who tried to break the boycott and to prevent this oil from reaching LILCO and CON EDISON (¶¶ 34, 38-44, A-43, 45-6). The documents the District Court excluded and the Court of Appeals ignored confirmed these facts and proved the direct relationship of the boycott to LILCO and CON EDISON. They demonstated that the oil companies conspired to impose the boycott, that they discussed closing the Eastern Seaboard to this oil, that they had been expressly warned of the consequences to LILCO and CON EDISON, but that they nevertheless jointly imposed the boycott, and then orchestrated and implemented it through the coordinating body to which they all belonged, the LPG.

There is no doubt that the boycott had the effect of restraining trade in low sulphur oil imported into the East Coast of the United States (¶ 23, A-39). As a result of the boycott, the utilities sustained certain injuries, which are set forth in the complaints (¶¶ 49-54, A-47-9). Petitioners submit that this is the only proper construction of the complaints, and the excluded documents simply reinforce its accuracy. Regardless of what in hindsight respondents may claim their only motive to have been, the fact is that the complaints plead, and the documents confirm, that a specific, expressly considered object of the conspiracy was to injure the utilities.

Moreover, as the Court of Appeals recognized when it found that the group boycott was aimed "secondarily at

Saudi Arabia," there can be multiple conspiracies, multiple targets, and primary and secondary boycotts.* Slip op. at 5728 (A-10). That Libya and Saudi Arabia may have been targets does not exclude the incontestable fact that LILCO and CON EDISON were also targets. At a minimum, this presented an issue of fact as to intent and motive that could not properly have been decided on a Rule 12(b)(6) motion.

Had the Court of Appeals analyzed the facts presented free of target area preconceptions, it would necessarily have determined that the utilities' injuries were anything but "remote" from the antitrust violations alleged, or "speculative" in nature. Contrary to the conclusions of the courts below, the utilities suffered no injury *because of their relationship to* NEPCO. Their injuries clearly resulted because they were the largest consumers of low sulphur oil. Unable to employ a substitute, they were compelled to pay the sharply increased prices demanded in the aftermath of respondents' acts. NEPCO did not suffer any injury which, through its "relationship" to LILCO and CON EDISON, somehow redounded to the utilities' disadvantage. As a cost-plus wholesaler of the Libyan oil, NEPCO, if anything, profited when the price of low sulphur oil rose.

NEPCO is a conduit; it buys oil from the majors, refines it, and resells it at a percentage markup to its customers. The oil companies' documents demonstrated that they explicity recognized NEPCO's middleman function, and knew that sale to NEPCO was in reality a sale to LILCO, CON EDISON, and other East Coast utilities.

Hence, to paraphrase the District Court, 390 F. Supp. at 1176 (A-26), the "result was precisely the same" as if NEPCO played no role whatever in the events from which these claims arose. The concerted shutdown of Libyan

*See, *Duplex Printing Co.* v. *Deering*, 254 U. S. 443 (1921).

production and export by the oil companies forced the utilities to obtain the commodity at all costs from whatever source available. The injuries sustained as a result of the actual prices they did have to pay were indisputably the direct and immediate consequence of the alleged antitrust violation. Indeed it should be apparent that the utilities were the *only* parties directly injured by the unlawful acts. A more careful analysis of the facts pleaded then, would have revealed that the description "remote," as applied to the utilities' damages, is entirely inconsistent with the realities of the distribution of Libyan low sulphur oil to the East Coast market. At the very least, there were substantial issues of fact which should not have been resolved on either a Rule 12(b)(6) or Rule 56 motion.

Thus, as Judge Waterman warned dissenting in *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F. 2d 183, 191 (2d Cir. 1970), *cert. denied*, 401 U. S. 923 (1971), the use by the courts below of:

> "inherited decisional labels may have obfuscated the positions of some plaintiffs so as to have denied them the recoveries which fact-analysis might have indicated they should have obtained."

E. Erosion of the *Poller* Rule

The substance of the decisions below, therefore, constituted summary judgment for defendants on the *merits* of these claims, and hence they are in sharp conflict with the *Poller* decision. In *Poller* this Court held that "trial by affidavit is no substitute for trial by jury." 368 U. S. at 473. Petitioners in these cases have not even been afforded that remedy; their affidavit and exhibits were ignored.* 390 F. Supp. at 1173 (A-21).

This same erosion of the *Poller* standard through rulings on Rule 12(b)(6) motions is occurring in a significant

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*See, *Conley* v. *Gibson*, quoted *supra*, p. 11-12.

number of antitrust standing cases (*see*, p. 12, n., *supra*). At the very least, a court confronted with complex antitrust claims, raising difficult issues and involving sharply conflicting factual contentions, should be required to exercise its discretion under Rule 12(b)(6) in favor of considering supplementary factual material. Indeed, this Court has recently held that:

> "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party . . . At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. *If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.*" *Warth* v. *Seldin*, 43 U. S. L. W. 4906, 4909 (June 25, 1975) (emphasis added).

If the *Poller* principle is to be maintained, this Court should now define a standard for decision of Rule 12 motions in antitrust litigation. It has already done so with great effect in regard to Rule 56. It should be obvious, following the logic of *Poller*, that motions to dismiss, prior to any discovery and development of the facts, should be even less favored. The dismissals below, which pose the problem so acutely, present this Court with the opportunity to set forth an essential guideline.

Dismissal at the pleading stage for lack of standing under Rule 12(b)(6) unquestionably dilutes the effectiveness of private enforcement of the antitrust laws. As the *Malamud* Court noted:

> "One method used to limit the applicability of Section 4 has been to employ the standing doctrine as a screening device to deny plaintiffs access to the courts." 1975-2 Trade Cas. at 66,947.

Hence, Justice Black's explanation for the granting of certiorari in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 136 (1968) is equally applicable here.

> "Because these rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States, we granted certiorari."

For the same compelling reason, this petition should be granted.

II—THE CONFLICT AMONG THE CIRCUITS ON RULES FOR DETERMINING WHO HAS STANDING TO SUE FOR ANTITRUST VIOLATIONS SHOULD BE RESOLVED

There is simply no way to reconcile the dismissals below with the language of Section 4 of the Clayton Act. That section gives the right to maintain an antitrust action to "*Any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . ." 15 U. S. C. § 15 (1970) (emphasis added). This broad coverage reflects the desire of Congress to protect "all who are made victims of the forbidden practices." *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948). Measured by that standard, under the express statutory mandate, it is clear that these utilities, who suffered injury as a result of a group boycott, should have standing to maintain these actions.

However, the courts of appeals in the different circuits have established a non-uniform series of rules that have operated, in cases like these, to limit severely the access of private antitrust plaintiffs to the courts. The re-

sult has been that whether a private plaintiff will have standing to prosecute an antitrust claim is often determined by the circuit in which the action is brought.

This Court has thus far refused to grant certiorari in any case directly raising this issue. It was argued by the oil companies below that a footnote to this Court's decision in *Hawaii* v. *Standard Oil Co. of California,* 405 U. S. 251, 263 (1972) appears to approve the notion that lower courts may properly impose some limits upon the application of Section 4. However, this Court has never sanctioned the restrictive rule of the Second Circuit or the current lack of consistency among the rules applied by the various circuits, and has never established a definitive standard.

Petitioners respectfully submit that the time has arrived for this Court to resolve the conflict among the circuits and to set down a uniform standard for the determination of when a plaintiff has standing to sue under the antitrust laws within the meaning of the Congressional intent embodied in Section 4.

There are at least three different tests prevalent in the circuits. It is perfectly plain that the outcome in a broad range of cases will differ from circuit to circuit and that even within a particular circuit, these "tests" are not applied with any consistency.

A. The Second Circuit's "Target Area" Test

The Second Circuit, in which these actions were brought, has adopted by a very divided court a so-called "target area" test for determining standing. Under the Second Circuit test:

> "[I]n order to have 'standing' to sue for treble damages under § 4 of the Clayton Act, a person must be within the 'target area' of the alleged antitrust conspiracy, i.e., a person against whom the conspiracy was aimed, such as a competitor of the

> person sued. Accordingly we have drawn a line excluding those who have suffered economic damage by virtue of their relationships with 'targets' or with participants in an alleged antitrust conspiracy, rather than by being 'targets' themselves." *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F. 2d 1292, 1295 (2d Cir. 1971), *cert. denied* 406 U. S. 930 (1972).

As construed by the Second Circuit in dismissing petitioners' claims, the "target area" rule denies standing "even [to] parties whose injuries may be both immediate and foreseeable" if that injury is "indirect or incidental, or if their business was not in the target area of the allegedly illegal acts."* Slip op. at 5728 (A-10).

B. The Ninth Circuit's "Target Area" Test

The Ninth Circuit proceeds on a significantly different concept. Although articulating a "target area" test to determine whether a plaintiff has standing, the Ninth Circuit inquires whether the injury to plaintiff was "foreseeable" and whether plaintiff fell within " 'the area which it could reasonably be foreseen would be affected' by the antitrust violation." *Hoopes* v. *Union Oil Co. of Calif.*, 374 F. 2d 480, 485 (9th Cir. 1967). In short, in the Ninth Circuit the inquiry will focus not on whether, in the court's view, a conspiracy was subjectively "aimed" at a particular person, but whether a plaintiff's business was " 'within that area of the economy which is endangered by a break-down of competitive conditions in a particular industry.' " *Karseal*

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*The Second Circuit's restrictive target area rule is seemingly followed by the Third and Tenth Circuits. *Harrison* v. *Paramount Pictures*, 211 F. 2d 405 (3d Cir.), *cert. denied*, 348 U. S. 828 (1954); *Nationwide Auto Appraiser Services* v. *Assoc. of C&S Co.*, 382 F. 2d 925 (10th Cir. 1967).

Corp. v. *Richfield Oil Corp.*, 221 F. 2d 358, 362 (9th Cir. 1955).*

In application, the Second and Ninth Circuits have reached diametrically opposed results in cases with strikingly similar facts. Compare, for instance, the target area analysis of landlords whose rentals decrease when tenants are injured by an antitrust violation in *Hoopes, supra*, and *Calderone, supra*, as well as owners of motion pictures whose income is diminished as a result of block-booking by distributors in *Mulvey* v. *Samuel Goldwyn Productions*, 433 F. 2d 1073 (9th Cir. 1970), *cert. denied*, 402 U. S. 923, (1971) and *Fields Productions, Inc.* v. *United Artists Corp.*, 432 F. 2d 1010 (2d Cir. 1970), *cert. denied*, 401 U. S. 949 (1971). Plaintiffs' injuries in these Ninth Circuit decisions were not held to be "remote", "derivative" or "consequential", but "squarely" within the target area of the alleged violation. In the Second Circuit, however, such plaintiffs were "remote" parties outside the target area of antitrust violations directed elsewhere.

C. The Sixth Circuit's Test

Most recently, however, the Sixth Circuit has rejected both of these tests and has adopted a standard analogous to that used in the area of administrative law in suits challenging governmental actions. *Malamud* v. *Sinclair Oil Corp.*, 1975-2 Trade Cas. ¶ 60,442 (6th Cir. 1975). Recognizing that under the guise of assessing the *standing of the claimant*, the inquiries of the Second and Ninth Circuits have instead been used to make a determination on

*The target area approach adopted by the Ninth Circuit is apparently followed in the Fourth, *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F. 2d 414 (4th Cir.), *cert. denied*, 385 U. S. 934 (1966); the Fifth, *Dailey* v. *Quality School Plan, Inc.*, 380 F. 2d 484 (5th Cir. 1967) (*but see Jeffrey* v. *Southwestern Bell Telephone Co.*, 1975 Trade Cas. ¶ 60,482 (5th Cir. 1975); the Seventh, *Congress Bldg. Corp.* v. *Loew's Inc.*, 246 F. 2d 587 (7th Cir. 1957); and the Eighth, *Sanitary Milk Producers* v. *Bergjans Farm Dairy, Inc.*, 368 F. 2d 679 (8th Cir. 1966).

the *merits of the claim,* the Sixth Circuit now requires only (a) that plaintiff allege that the defendant caused him injury in fact and (b) that plaintiff demonstrate that the interest sought to be protected falls "within the zone of interests to be protected . . . by the statute. . . ." 1975-2 Trade Cas. at 66951. This approach recognizes that although not every person may have access to the courts, the "fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and *not on the issues he wishes to have adjudicated.*" *Flast* v. *Cohen,* 392 U. S. 83, 99 (1968) (emphasis added); *Malamud, supra,* 1975-2 Trade Cas. at 66949.

D. The Cases at Bar

Plaintiffs with serious antitrust claims should not have to go circuit shopping prior to instituting litigation. It is clear that the utilities' claims would not have been dismissed in either the Ninth or Sixth Circuit, and should not have been dismissed in the Second Circuit.

Under the Ninth Circuit test, it would be beyond dispute that the effect of the boycott on the utilities had to have been reasonably foreseen. Even the opinion of the Second Circuit expressly recognized that "[i]t was foreseeable, certainly that . . . this boycott would have some effect, possibly adverse . . . on the business and property of NEPCO's customers, LILCO and CON EDISON." Slip op. at 5728 (A-10). Respondents knew that the particular low sulphur fuel in question was used primarily to supply these utilities and were warned expressly that the boycott could cause "potentially irreparable damages" to the utilities, including "severe power blackouts" in their service area. Surely the boycott signaled a complete breakdown of competitive conditions in the import of low sulphur oil to the East Coast, which had its most severe effect on the utilities.

In the Sixth Circuit, of course, plaintiffs would have standing because the complaints allege (a) injuries in fact caused by the defendants—the marked increase in the price the utilities had to pay for the only low sulphur oil obtainable after the boycott, and (b) that they were in the zone of interests protected by the Sherman Act—the boycott necessarily had to have greatest effect on two of the largest consumers of low sulphur oil—in fact, they and other East Coast utilities were the *only* parties injured (*see*, p. 19, *supra.*). Moreover, unlike the District Court and Second Circuit, the Sixth Circuit would surely have refrained from making a decision on the merits on the issues the utilities sought to have adjudicated. The Second Circuit *found as fact* that the boycott was "aimed primarily at Libya and secondarily at Saudi Arabia," (Slip op. at 5728, A-10)—a conclusion not based upon the allegations of the complaints—and that under no possible construction of the complaints could the utilities be found to be "objects" of the conspiracy. *Id.* The Sixth Circuit, petitioners submit, would not have reached this result, for it clearly presupposes the outcome on the merits of the issues to be tried. Furthermore, if there were doubts, in resolving them on this motion the Sixth Circuit would surely have taken into account the documents presented by the utilities, which the Second Circuit and the District Court refused to do.

This Court has held time and time again that Sherman Act protection is not confined to any particular class of plaintiffs:

> "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated . . ." *Mandeville Island Farms, supra,* 334 U. S. at 236.

The result in these cases, we submit, is inconsistent with this avowed purpose of the antitrust laws, would not have been reached in at least two (and probably six) other circuits, and should not have been reached below.

Therefore, petitioners respectfully ask this Court to grant a writ of certiorari to end the conflict among the circuits and to set a uniform rule and uniform standards to determine when a clearly injured plaintiff has standing to maintain a private antitrust action.

III—THE SECOND CIRCUIT'S "TARGET AREA" STANDING TEST CONTRADICTS THE SETTLED CONSTRUCTION OF THE ANTITRUST LAWS ESTABLISHED BY THIS COURT.

If this Court grants certiorari, petitioners will ask the Court to reject the Second Circuit rule because it is overly restrictive and subject, as here, to serious misapplication. Although the most serious *per se* antitrust violations have been committed by the oil companies, the result below is that no one has "standing" to sue, except perhaps the Arabs. In short, East Coast utilities and millions of American consumers have been victimized, but, in the name of "standing", that grievance may not be redressed.

Although this Court has refrained to this point from establishing a definitive rule of standing in antitrust suits, it has made clear that the broad reach of the Sherman Act and the Congressional intent behind the private cause of action provided by Section 4 of the Clayton Act require that any test for antitrust standing be liberal in its approach and application.

In *Mandeville Island Farms, supra,* this Court stated:

> *"The statute [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.* Nor does it immunize the outlawed acts because they are done by any of these . . . The Act is *comprehensive* in its terms and coverage, protecting all who are made victims of the forbidden

> practices by whomever they may be perpetrated. . ." 334 U. S. at 236 (emphasis added).

Later, in *Radovitch* v. *National Football League,* 352 U. S. 445 (1957), this Court specifically warned against judicial creation of impediments to antitrust plaintiffs that would negate the potency of the private enforcement weapon.

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade' . . . and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public . . . *In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws.*" 352 U. S. at 453-454 (emphasis added).

See, also, Radiant Burners Inc. v. *People's Gas, Light & Coke Co.,* 364 U. S. 656, 660 (1961).

Of course it is apparent that the policy of Section 4 is contrary to the automatic exclusion of any particular class of plaintiff or to the rigid application of a rule which imposes a pleading burden on plaintiff beyond that contemplated by the Federal Rules. However, it is precisely these contrary policies that the Second Circuit test embodied and the courts below applied.

The standing test formulated and applied by the Second Circuit relies exclusively on a categorization of plaintiffs into "types" which by definition, are "remote" and do not have standing. Thus, the Court of Appeals below held simply that, "The cases recognize that suppliers, stock-

holders, employees, landlords, franchisors, licensors, and consumers, are too remote for Clayton Act standing." Slip op. at 5728-9 (A-10-11). The contrast between this reasoning and the language of *Mandeville Island Farms*, quoted *supra*, could not be more apparent.

Moreover, the Second Circuit's *a priori* "pigeonhole" methodology has encouraged lower courts to dispose of standing motions without critical analysis of the circumstances from which the claims arise. Thus, in the District Court petitioners were categorized (and their claims discarded) as "customer[s] of a former customer". 390 F. Supp. at 1175 (A-25). Subsequently, the Court of Appeals characterized petitioners as "customers of a non-target".* Slip op. at 5729 (A-11). Neither court undertook to examine the actual relationship between the oil companies' unlawful conduct and the utilities' resultant injury. A standing test which in formulation or in application operates to exclude broad classes of plaintiffs on the basis of adjudications which ignore the factual realities posed by each case is wholly at odds with the policies of the antitrust laws elucidated by Congress and by this Court.**

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*The emphasis of both courts on the presence of the intermediary NEPCO conflicts with this Court's decisions in *Hawaii* v. *Standard Oil Co. of Calif.*, 405 U. S. 251 (1972) and *Perkins* v. *Standard Oil Co. of Calif.*, 395 U. S. 642 (1969), where second tier purchasers were found to have standing under Section 4 of the Clayton Act.

**Prior to the institution of these cases, one commentator wrote:

> "To say that a plaintiff's injury must be 'directly' rather than 'indirectly' or 'incidentally' traceable to the defendant's violation of the antitrust laws serves only to announce a result; it is not a reliable tool by which the result may be reached.
>
> . . . .
>
> Similarly, to say that the plaintiff must be within the 'target area' of the offense is to indulge in an unilluminating metaphor which leaves unanswered how the metes and bounds of the target are to be defined. *To be sure, if the defendant can be shown to have expressly intended to injure the plaintiff, he can properly be said to have aimed at him and thus to have incurred liability.* But what of the multitudinous cases where proof of such specific intent will be lacking?" Handler, *The Shift From Substantive To Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1, 27 (1971) (emphasis added).

The Second Circuit's amorphous target area test is capable of serious misapplication, as exemplified by the decisions below. Although the Second Circuit has stated that its test requires a "rule of reason" approach to standing, *Calderone, supra*, 454 F. 2d at 1296, in fact that does not occur. Indeed, none of the required exploration of the circumstances surrounding this case in light of the underlying policy considerations took place below. The District Court dismissed upon a 16-line standing "analysis", and the Court of Appeals did not comply with the "rule of reason" dictates of its prior decisions. For if such an approach had been applied below, the courts could not have concluded that the utilities lacked standing.

Assuming that "remote parties with possibly speculative injuries" (Slip op. at 5728, A-10) lack standing under the target area standard, even a cursory review of the facts involved would have revealed to the courts that the utilities were decidedly not remote from the alleged antitrust violations, and their injuries not speculative. The oil companies jointly ceased to export Libyan low sulphur oil. The utilities, required by environmental regulations to burn only such oil, were compelled to pay whatever price necessary to obtain supplies from the only source available. The causation is direct, and the damages hard and calculable.

The "remoteness" concept as a rationale for dismissing petitioners' claim is clearly improper in light of the importance of the utilities to the success of the oil companies' boycott. Petitioners were not merely the foreseeable victims of the oil companies' action, they were necessarily the intended and essential objects of the decision to cease export of Libyan crude oil. The LPG majors were aware that if the utilities, the largest purchasers of Libyan oil, were able to obtain adequate supplies elsewhere, then clearly the LPG action would be ineffective. For the leverage derived from the majors' control over market access, which they hoped to

employ to force a rollback in Libyan participation demands, would thus dissipate. The "hot oil" campaign, consisting of threats and the 25 lawsuits instituted by the oil companies to prevent Libyan low sulphur oil from reaching the East Coast, is unequivocal evidence of the focus of respondents' unlawful acts. A direct object, or "target area" of the conspiracy, was, therefore, the isolation of the East Coast utilities from their normal supply of low sulphur oil.

The conceptual difficulty of treating petitioners as "remote" victims despite these facts was manifested in the confused verbiage with which the Court of Appeals sought to buttress its inconsistent conclusion. The utilities were held ineligible as antitrust plaintiffs because, "Under the rule, even parties whose injuries may be both *immediate* and foreseeable may lack standing to pursue a private remedy *if* that injury is *indirect or incidental* . . ." Slip op. at 5728 (A-10) (emphasis added). Given ordinary definitions, it is hard to conceive of an injury that is concededly "immediate" but nevertheless "indirect or incidental." Such empty phraseology, which was compelled by the anomalous result reached on the facts presented here, must not be allowed to settle as a "rule" of standing, and should be rejected as a basis for dismissing these petitioners' claims.*

The result reached below is particularly inappropriate since none of the possible countervailing policy considerations discussed in *Calderone, supra,* 454 F. 2d at 1295, that might encourage a beleaguered court to ignore Congressional intent and deny "standing," were at all present in the case at bar. Multiple liability and the "floodgates" problem were not potential threats. No other possible "target" has filed a similar claim. NEPCO, a partner

*The inconsistancy inherent in the Court's ruling is emphasized by the Court's reinstatement of LILCO's Second Claim for Relief. It was held that LILCO clearly had standing to pursue the Second Claim, yet the Second Claim incorporated almost all of the allegations of the First (¶ 57, A-50, and *see*, p. 11, *supra*).

heavily in debt to SOCAL, suffered no injury and, if anything, profited from the price increase. Moreover, from the documents adduced below, it appears that NEPCO may have settled any possible claims it may have had against SOCAL. The injury to each of petitioners' subscribers is obviously too small to justify individual litigation, and their standing to sue as a class would be dubious.* Nevertheless, the aggregate out-of-pocket losses of the mass of customers in petitioners' service areas represents a substantial public injury which should be redressed. The utilities are committed to distributing damages recovered in these actions representing increased fuel costs to their subscribers under the supervision of the New York State Public Service Commission to rectify part of this public injury. The Public Service Commission obtained leave and filed a brief *amicus curiae* in support of petitioners' position in the Court of Appeals.

Indeed, it should be apparent that the utilities are the only parties financially in a position to prosecute these actions and vindicate the public interest at stake. If they are denied standing, no one can sue the oil companies for the antitrust violations alleged and substantiated in preliminary discovery. Therefore the misapplication of the Second Circuit's amorphous standing rule not only extinguished the broad collective interest in these proceedings but totally immunized the oil companies from private liability for their acts. Therefore the policy considerations that support the standing rules of Section 4 were clearly undercut, not advanced, by the *per se* responses of the courts below.

A definitive standard under Section 4 is clearly in order. However, petitioners submit that irrespective of the rule

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See, Commonwealth Edison Co. v. *Allis-Chalmers Mfg. Co.*, 315 F. 2d 564 (7th Cir.), *cert. denied*, 375 U. S. 834 (1963). In addition, the feasibility of a suit on behalf of a class as large as that which would be involved here is highly questionable. *See, Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156 (1974).

adopted, except in certain limited and unusual situations, standing determinations should not and cannot be made at the most preliminary stage of litigation. Rather, decisions on standing, particularly in factually complex cases like these, should await fuller development of the facts after opportunity for adequate discovery, and must be grounded on the particular facts of such discovery. Only in this manner will the courts be able to arrive at reasoned conclusions on the essentially factual issue of "remoteness" —based on hard evidence rather than on "inherited decisional labels." Even if the Court should now eschew substantive rule-making, enunciating guidelines as to the exercise of such procedural discretion by the lower courts would go far toward curing the worst consequences of the restrictive standing tests.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully submit that this petition should be granted, and a writ of certiorari issue to the Court of Appeals for the Second Circuit.

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Respectfully submitted,

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